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No. 82-593

IN THE

Supreme Court of the United States

October Term, 1982

CITY OF BURBANK, a municipal corporation and political subdivision of the State of California,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CITY OF BURBANK IN REPLY

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Petitioner City of Burbank ("Burbank"), through counsel, submits this reply to the Brief for the United States in Opposition ("Opposition") in the above-captioned action.

REPLY

Only three matters addressed by respondents in their Opposition need reply. First, respondents erroneously contend that "the decision in *County of Los Angeles* [*v.*

Marshall[1]] resolved all of the constitutional issues presented," and, therefore, res judicata and collateral estoppel bar this suit.[2] As discussed more fully in the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit ("Petition"), at 25-30, and as respondents recognize,[3] in *County of Los Angeles,* the District of Columbia Circuit simply adopted the reasoning of the First Circuit in *New Hampshire Department of Employment Security v. Marshall,*[4] to which Burbank was not a party. As a result, the District of Columbia Circuit did not address the merits of Burbank's claims. Under these circumstances, application of res judicata and collateral estoppel would serve only to deny petitioner the opportunity of having its claims resolved by the courts, and, accordingly, these doctrines should not be applied.

Further, even to the extent that *County of Los Angeles* may have some applicability to the instant suit, that decision and the *New Hampshire* decision were limited to the tenth amendment issue. As such, they do not resolve the larger federalism issues, particularly petitioner's claims that the Unemployment Compensation Amendments of 1976 ("1976 Amendments" or "Amendments"),[5] which, in rele-

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[1]631 F.2d 767 (D.C. Cir.), *cert. denied,* 449 U.S. 837 (1980) (Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 8a, City of Burbank v. United States, *petition for cert. filed,* 51 U.S.L.W. 3,305 (U.S. Oct. 1, 1982) (82-593)).

[2]Opposition at 4-6.

[3]*Id.* at 6.

[4]616 F.2d 240 (1st Cir.), *appeal dismissed* and *cert. denied,* 449 U.S. 806 (1980) (Petition at 31a).

[5]Pub. L. No. 94-566, 90 Stat. 2667.

vant part, amended the Federal Unemployment Tax Act ("FUTA")[6] to require the States to extend unemployment compensation coverage to state and local employees, violate the doctrine of intergovernmental tax immunity and the constitutional guarantee of a republican form of government. The plaintiffs in *County of Los Angeles* sought resolution of these issues,[7] but, because the court was interested primarily in "inter-circuit comity" and the "husbanding of scarce judicial resources,"[8] its decision, at most, necessarily is limited to the tenth amendment. Consequently, res judicata and collateral estoppel are inapplicable to the federalism issues.

Second, without providing any explanation, respondents assert that petitioner "errs in urging (Pet. 29-30) that the issues presented in the instant case are so important that the bars of res judicata and collateral estoppel should be disregarded."[9] Contrary to respondents' unsupported assertion, however, the issues raised by this suit are of the greatest importance because they go to the heart of this country's form of government.

The 1976 Amendments are applicable to every state, county, city, village, township, borough, etc. throughout the United States. Under constant threat of the loss of billions of dollars to themselves and their citizens,[10] these Amendments have necessitated, and continue to necessitate, massive payments to the federal government from the budget of every State and political subdivision.

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[6]26 U.S.C. §§ 3301-3311 (1976 and Supp. V 1981), *as amended by* Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324.

[7]*See* Petition at 29.

[8]631 F.2d at 768.

[9]Opposition at 6.

[10]*See* Petition at 11-13.

As this Court has emphasized, "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."[11] The 1976 Amendments threaten to destroy this constitutional guarantee. Accordingly, respondents' contention that the issues raised by this suit are not important is devoid of merit, and the doctrines of res judicata and collateral estoppel must not be applied to avoid resolution of these issues.

Finally, respondents argue that, in *Charles C. Steward Machine Co. v. Davis*[12] and *Carmichael v. Southern Coal & Coke Co.*,[13] the Court resolved petitioner's tenth amendment claims.[14] Apart from the fact that petitioner's claims are not limited to the tenth amendment, *Steward* and *Carmichael* do not resolve even the tenth amendment issue. As discussed in the Petition, at 29 n.84, when *Steward* and *Carmichael* were decided, Title IX of the Social Security Act of 1935,[15] the predecessor of the FUTA, did not provide for unemployment compensation coverage of state and local employees. Therefore, the Social Security Act did not necessitate the expenditures by state and local governments, with the resulting detrimental impact on state and local government operations, which the 1976 Amendments have necessitated. Accordingly, state and local governments were not party plaintiffs to the *Steward* and *Carmichael* suits.

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[11]Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869).

[12]301 U.S. 548 (1937).

[13]301 U.S. 495 (1937).

[14]Opposition at 6-8.

[15]Pub. L. No. 271, 49 Stat. 620.

Although the Court discussed the tenth amendment, it did so only in the context of the allegations made by the private party plaintiffs, who certainly lacked standing to assert the interests of the States and their political subdivisions. Thus, *Steward* and *Carmichael* do not resolve petitioner's tenth amendment claims for two reasons – one because the provisions of the FUTA as amended which petitioner challenges were not part of the Social Security Act, and two because the Court's discussion of the tenth amendment was limited to the private party context in which the claims were raised.[16]

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[16]It is noteworthy that, in attempting to distinguish the instant suit from National League of Cities v. Usery, 426 U.S. 833 (1976), respondents characterize the FUTA as a conditional federal benefit statute with which the States need not comply, and accordingly, argue that this Court has held such statutes to be constitutional. Opposition at 8. In support of their argument, respondents rely on King v. Smith, 392 U.S. 309 (1968), wherein the Court recognized that "[t]here is of course no question that the Federal Government, *unless barred by some controlling constitutional prohibition,* may impose the terms and conditions upon which its money allotments to the States shall be disbursed. . . ." 392 U.S. at 333 n.34 (emphasis added) (citing Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958); Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127 (1947), also cited by respondents). For the reasons set forth in the Petition, at 11-13, petitioner disagrees with respondents' characterization of the FUTA, and takes the position that the States' compliance with the 1976 Amendments is mandatory. However, assuming arguendo that respondents' characterization is accurate, the 1976 Amendments still may not be upheld. As the above quotation upon which respondents rely makes clear, the conditions which the federal government may impose on federal benefits are limited by the Constitution. As discussed in the Petition, at 13-25, the 1976 Amendments violate a variety of constitutional guarantees. Consequently, even under respondents' analysis, the Amendments cannot stand.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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